80-511

Supreme Court, U.S.
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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ELECTRIC COMPANY, *Petitioner*,

v.

CURTISS-WRIGHT CORPORATION, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the context of a suit between large institutional parties under a major Government program, ultimately involving the payment of public funds, may Federal Courts refuse to enforce a contractual clause requiring a Government subcontractor to release the Government and the prime contractor "as a condition precedent to final payment . . . from all liabilities, obligations and claims arising under or by virtue of" the subcontract?

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IN THE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

General Electric Company petitions for a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit entered in this case on July 3, 1980.

OPINIONS BELOW

The Judgment Order of the Court of Appeals for the Third Circuit was entered on July 3, 1980, without opinion; and appears at page 1a of the Appendix to this Petition ("App."). The Third Circuit had this cause upon remand from this Court, which had ruled that the District Court's Rule 54(b) certification should have been sustained. No. 79-105, decided April 22, 1980, _____ U.S. _____, 100 S.Ct. 1460.[1] The opinion of the District Court now pertinent was entered on December 5, 1977; and also is not reported (App. 2a-9a).[2]

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on July 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In the Naval Nuclear Program of the United States Government, Petitioner General Electric Company ("General Electric") is a prime contractor responsible

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[1] The opinions of the lower Courts with respect to the entry of judgment under Rule 54(b), Federal Rules of Civil Procedure, are as follows: The unreported letter opinions of the District Court, dated February 24 and July 27, 1978, respectively, and the opinions of the Court of Appeals for the Third Circuit of April 17, 1979, vacating the entry of the Rule 54(b) judgment, and of June 4, 1979, on petition for rehearing, which are reported, respectively, at 597 F.2d 35 and 599 F.2d 1259. This Petition does not seek review of any issues discussed in those opinions.

[2] The Appendix filed in No. 79-105 will be cited hereinafter as "S. Ct. App.". The Appendix filed in the United States Court of Appeals for the Third Circuit will be cited hereinafter as "C. A. App.". The opinions referred to in footnote 1, above, appear, respectively, in S.Ct. App. at pp. 178a, 196a, 218a and 246a.

for the procurement and administration of supply and service contracts. Starting in 1968, General Electric entered into a series of subcontracts with Respondent Curtiss-Wright Corporation ("Curtiss-Wright") for the manufacture of large nuclear components used in the propulsion system of Naval Nuclear vessels, for a fixed price. The first 21 of these subcontracts, having a value of almost $215,000,000, are involved in this action. All the subcontracts contained the clause now before the Court, requiring Curtiss-Wright to release both General Electric and the Government from all claims "as a condition precedent to final payment. . . ." (App. 16a-17a).

As appears from the opinion of this Court, _____ U.S. at _____, 100 S.Ct. at 1463, Curtiss-Wright brought this action against General Electric seeking damages in excess of $60,000,000. Essentially, Curtiss-Wright, despite the fixed-price character of the contracts, sought to shift to General Electric the burden of cost overruns incurred due to difficulties Curtiss-Wright encountered in the performance of these contracts. Curtiss-Wright's original Complaint recited 16 Counts, ranging from fraud and misrepresentation and mistake to breach of contract. General Electric denied the essential allegations of the Complaint and asserted various affirmative defenses, as well as Counterclaims seeking damages of approximately $54,000,000.

After issue had been joined on its original Complaint, Curtiss-Wright amended it to add three Counts alleging that it was entitled to final payment, aggregating approximately $19,000,000, under these subcontracts, despite its assertion in this action of other claims arising under them (S. Ct. App. 78a-80a, 208a-209a). This final payment was withheld by General Electric in reliance upon a clause, appearing in each of the 21 contracts,

providing that "Seller [Curtiss-Wright] . . . agree[s] as *a condition precedent to final payment,* that *the Buyer [General Electric] and the Government . . . are released* from *all* liabilities, obligations and claims arising under or by virtue of this order" (Terms and Conditions of Purchase, Article 5c, App. 17a).[3] Another contractual provision gave standard form invoicing instructions, which specified the manner in which the requisite release was to be given:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that *all claims on this Order against General Electric Company — M.A.O. and/or the Government have been resolved*" (App. 30a).[4]

When it requested the final payments under the 21 subcontracts, Curtiss-Wright undisputedly refused to comply with these release clauses. Instead, Curtiss-Wright offered a qualified release, purporting to reserve "only" the claims of more than $60,000,000 made in its Complaint (S. Ct. App. 95a-96a). Navy approval was required to make the final payments, which ultimately were to be made from the public fisc. The Navy refused approval, relying upon the plain terms and intendment of the subcontracts; and General Electric declined to

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[3] Emphasis added throughout this Petition.

[4] The Terms and Conditions of Purchase also provide that:

> "Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs" (Article 5a, App. 15a).

make final payments without the release of all claims prescribed by the subcontracts.[3]

Upon cross-motions for partial summary judgment directed to the release issue, the District Court held that

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[3] The Navy stated:

> "The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.
>
> "Curtiss-Wright's present pursuit of claims against [General Electric] under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected" (App.24a-25a).

Navy approval was required for the determination of final price, and thus for final payment, by the prime contracts between the Navy and General Electric and by the subcontracts between Curtiss-Wright and General Electric (App.17a-18a, 19a, S. Ct. App. 161a, C.A. App. 156).

The principal allegations of the Complaint were directed to events which occurred years before the action was commenced. The fraud in the inducement claims were based upon representations which allegedly occurred primarily in 1968, when Curtiss-Wright entered the business of producing large components for the Naval Nuclear Program, and prior to its 1969 agreement to expand significantly its participation in that Program (S. Ct. App. 7a-11a; *see also* Plaintiff's Response to Defendant's Interrogatories to Plaintiff, Nos. 3, 6-11, in the District Court Record). Most of the other claims were based upon allegations of "mutual mistake" or overreaching by General Electric, in this same early period, which Curtiss-Wright claimed resulted in the subcontracts not making "adequate provision" for the difficulty of the work (S. Ct. App. 25a-31a). Curtiss-Wright by its own admission knew at least as early as 1971 that it was substantially overrunning its projected labor hours (Transcript of Deposition of T. Roland Berner, Chairman of the Board and President of Curtiss-Wright, at 257).

Curtiss-Wright was entitled to final payment, notwithstanding the release clause (App. 2a-9a). The District Court's opinion reflects no apparent consideration of the unambiguous character of the language stamping release of all claims as a "condition precedent" to final payment or the public policy compelling prompt raising and resolution of disputes concerning payment of public funds. Rather, purporting to apply New York law, which the subcontracts provided should be governing, it chose to rest upon a solitary New York decision, discussed below, which was concerned with quite different contract language; evidently, the decision was actually determined by the Court's views of the equities of the situation regardless of the subcontract terms.

On Curtiss-Wright's motion, the District Court orders awarding it final payment were certified as final judgments under Rule 54(b). On appeal by General Electric, the Third Circuit vacated the orders granting Rule 54(b) certification, and therefore did not reach the merits of the release clause issue. 597 F.2d 35 (3d Cir. 1979). This Court granted certiorari and reversed. _____ U.S. _____, 100 S.Ct. 1460 (1980). Upon the remand to the Third Circuit, that Court affirmed the decision of the District Court without opinion, and without giving any reasons for its decision (App. 1a). The Third Circuit denied a stay of mandate pending this Petition; the District Court denied a stay request patterned upon footnote 3 of this Court's opinion; and payment was made on September 2, 1980, of some $23,000,000, ultimately of Navy funds. Whether that payment should have been decreed, with Curtiss-Wright deliberately refusing to release General Electric and the Navy from all claims, is the issue which is now being presented to this Court.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN ISSUE OF GENERAL IMPORTANCE DECIDED BELOW INCONSISTENTLY WITH DECISIONS OF THIS COURT.

This case presents an issue of general importance in the administration of Government contracts and the preconditions for paying out public funds, which has been determined below inconsistently with the decisions and teaching of this Court. A subcontractor who solemnly agreed in over a score of successive contracts to provide a release to the Government and the prime contractor, expressly and unambiguously as a "condition precedent" to final payment, has been permitted to be paid millions of dollars of public funds, all the while refusing to provide or be bound by the specified release. The consequences are grievous and pervasive, and should not be tolerated to stand unreviewed by this Court.

1. *General Importance.* The decision below flouts the public policies favoring prompt raising and resolution of disputes under Government contracts, and more generally, that contracts be enforced according to the provisions agreed upon by the contracting parties rather than to the dictates of judicial reframing. Consistent enforcement of this policy and this clause will insure that public contractors and subcontractors will submit any claims promptly as they arise, and not defer requests for relief until the conclusion of the period of performance. It provides too facile a means for subverting this policy to permit public contractors to engage in long delays before asserting any claims, and then, merely by filing an action, avoid the strictures of a clause which expressly mandates a full release as a "condition precedent" to final payment.

The general public importance of the issue may be gauged by the amount of United States Treasury dollars made vulnerable by the decisions below. Almost one and two-thirds billion dollars ($1,600,000,000) have been involved in Navy subcontracts using the identical language and subject to the identical law. Almost one billion (over $975,000,000), including the amounts involved in this case, are in contracts which are open. Whether Government funds should be paid while claims which seek additional Government payments are outstanding, in defiance of a contractual agreement that final payment cannot be made before complete release of the Government as well as the prime contractor, is a question of general importance warranting the attention of this Court.

2. *Inconsistency With Decisions of This Court.* The question has been decided below inconsistently with decisions of this Court. Contract clauses providing for release before final payment, or providing other means to insure prompt raising and resolution of disputes under Government contracts, have been consistently sustained by this Court.

In *United States* v. *William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 126, 128 (1907), for example, this Court established principles of decision disregarded below:

> "The sixth paragraph of this clause makes special provision for the last payment, to be made . . . 'on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract.' *Evidently the parties contemplated and specially provided by this stipulation that the whole matter of the contract should be ended at the time of the final release and the last payment.*

> "[T]he general language of the release itself . . . show[s] that it was the intent of the Secretary of the Navy to have a final closing of all matters arising under or by virtue of the contract.
>
> "*Stipulations of this kind are not to be shorn of their efficiency by any narrow, technical, and close construction.*"

Accordingly, this Court has forestalled other efforts of Government contractors to avoid the effect of clauses with similar purposes, emphasizing "the duty of trial courts to recognize the right of parties to make and rely on such mutual agreements", and "the principle that parties competent to make contracts are also competent to make such agreements." *E.g., United States* v. *Moorman*, 338 U.S. 457, 461 (1950); *United States* v. *Wunderlich*, 342 U.S. 98, 100 (1951).

The ruling below is fully as unacceptable as the line of Court of Claims cases rejected in *Moorman* and *Wunderlich*. It injects uncertainty into a great many contracts in the Naval Nuclear Program. It renders nugatory the negotiation of similar clauses. It rewards one party to a public contract with a valuable benefit denied by the plain terms of the contract, and denies Petitioner and the Government the protection that they won in contract negotiations and that is plainly included as an express term.

The decision below turns its back upon the many decisions of this Court, and a fundament of our economic and legal system, that contracts are to be enforced in accordance with their unambiguous terms; parties must be held to the contract terms that they have negotiated. *See United States* v. *Standard Rice Co.*, 323 U.S. 106, 111 (1944) (contract would not be revised on the ground that a more prudent one might have been

made); *cf. M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972) (enforcing forum selection clause); *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 668 (1969) (purchaser may not repudiate his bargain) (dictum). These principles are so rooted deeply in our jurisprudence that this Court has upheld and enforced contractual provisions with far more drastic consequences than the clause which the Courts below excused Curtiss-Wright from complying with, presumably because they felt the result inequitable. *See, e.g., D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 186-188 (1972) (cognovit note with confession-of-judgment clause upheld in commercial context); *United States* v. *Moorman*, 338 U.S. 457 (1950) (clause in Government contract making decisions of representative of contracting agency "final and binding"); *Sweeney* v. *United States*, 109 U.S. 618 (1883) (clause providing for withholding of payment on Government construction contract until Government agent certified after inspection that " 'it was in all respects as contracted for' "); *Kihlberg* v. *United States*, 97 U.S. 398 (1878) (clause vesting final power in local agent of contracting agency to fix distances on which payment for transportation based); *see also Warner* v. *Cox*, 487 F.2d 1301 (5th Cir. 1974).

The approach and teaching of these decisions of this Court were so disregarded below that this Court should not sanction the judgment below by letting it go unreviewed. The Court should not leave exposed hundreds of millions of dollars of the public fisc in Naval Nuclear Program subcontracts, particularly when the judgment below appears refuted by the unambiguous

contract terms and unsupported by law. There seems only one way to read the following clause, for it definitely means what it clearly says:

> "Seller [Curtiss-Wright] . . . agree[s] *as a condition precedent to final payment,* that *the Buyer* [General Electric] *and the Government . . . are released* from all liabilities, obligations and claims arising under or by virtue of this order."

The contracts are specific as to how Curtiss-Wright was to go about making the release:

> "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that *all claims on this Order against General Electric Company-M.A.O. and/or the Government have been resolved.*"

As Curtiss-Wright certainly did not release its claims, the terms of its agreements should have precluded its receipt of final payment.

The ground relied upon by Curtiss-Wright, and the one adopted by the District Court, for this flat refusal to enforce a contractual provision, appears patently unsupportable. Curtiss-Wright asserted below that the contract provision here should be "analogized" to ones relating to final payments but which do not provide that giving a release is a "condition precedent" to such final payment. Based on one decision of this kind, *Tufano Contracting Corp.* v. *Port of New York Authority,* 33 Misc.2d 1028, 227 N.Y.S.2d 707 (Sup.Ct. 1962), *aff'd mem.*, 18 App.Div.2d 832, 237 N.Y.S.2d 562, *aff'd mem.*, 13 N.Y.2d 967, 244 N.Y.S.2d 643, 194 N.E.2d 603 (1963), involving a contract clause which did *not* contain any "condition precedent" proviso, the District Court took the position that a New York court would not enforce the plain language of the "condition precedent" clauses, albeit the New York courts, as well as all others, em-

phatically do enforce, as written, contracts in general,[6] and condition precedent clauses in particular.[7] Indeed, the Courts of that State, like this Court, have served the public policies involved and have held enforceable conditions precedent to final payment indistinguishable from those at bar.[8]

According to the prescripts of this Court, the Courts below were not free, as they evidently assumed they were, to engraft a special exception for a result they deemed harsh upon the long-established and quite clear New York agreement with the general principles that condition precedent clauses, and indeed all contract terms, are to be enforced according to their language.

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[6] *See, e.g., Morlee Sales Corp.* v. *Manufacturers Trust Co.*, 9 N.Y. 2d 16, 210 N.Y.S.2d 516, 172 N.E.2d 280 (1961); *Bethlehem Steel Co.* v. *Turner Constr. Co.*, 2 N.Y.2d 456, 161 N.Y.S.2d 90, 141 N.E.2d 590 (1957). As was stated in *Western Union Telegraph Co.* v. *American Communications Ass'n*, 299 N.Y. 177, 184, 86 N.E.2d 162, 166 (1949):

> "Where . . . 'the language is unambiguous, the words plain and clear, conveying a distinct idea, there is no occasion to resort to other means of interpretation. Effect must be given to the intent as indicated by the language employed.' "

[7] *See, e.g., A. D. Granger Co.* v. *Brown-Ketcham Iron Works*, 204 N.Y. 218, 222, 97 N.E. 523, 524 (1912); *Coulter* v. *Board of Education*, 63 N.Y. 365, 368-369 (1875); *see also Allis-Chalmers Mfg. Co.* v. *Malan Constr. Corp.*, 30 N.Y.2d 225, 231, n.4, 282 N.E.2d 600, 602, n.4, 331 N.Y.S.2d 636, 639, n.4 (1972); *Schuler-Haas Elec. Corp.* v. *Aetna Cas. & Surety Co.*, 49 App. Div.2d 60, 64, 371 N.Y.S.2d 207, 210 (1975), *aff'd mem.*, 40 N.Y.2d 883, 357 N.E.2d 1003, 389 N.Y.S.2d 348 (1976). *Cf. United States Fidelity & Guaranty Co.* v. *Triborough Bridge Authority*, 297 N.Y. 31, 74 N.E.2d 226 (1947); *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F.2d 142, 144 (2d Cir. 1957) (applying New York law).

[8] *E.g., Coulter* v. *Board of Education*, 63 N.Y. 365, 368 (1875) ("By this provision the parties evidently contemplated that all claims arising out of or in consequence of the contract should be presented and liquidated before the final payment was made. If the

Day & Zimmerman, Inc. v. *Challoner*, 423 U.S. 3, 4 (1975) ("[a] federal court in a diversity case is not free to engraft onto . . . state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State. . ."); *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959); *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940). The judgment below rests upon the circumvention of direct, clear provisions of contracts and specific commands of law by an "analogy" to a case with different and inapplicable considerations. It orders the payment of public funds when they should not be paid, when payment violates the terms of a Government subcontract.

The judgment below is antagonistic to the public interest that Government contracts be enforced and Government funds be paid, only in strict compliance with law. This Court should not countenance such a radical departure from the dictates of basic law and the direction of many decisions of this Court. The judgment below subverts fundamental public policies sustaining the prompt assertion and adjudication of claims under public contracts, and insisting that contracts should be enforced as written and intended, including, contrary to the decision below, plain clauses in Government subcontracts making full release of the prime contractor, and the Government, a "*condition precedent*" to final payment.

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plaintiff had declined to give the certificate he could not have enforced the payment. . . ,"); *Schuler-Haas Elec. Corp.* v. *Aetna Cas. & Surety Co.*, *supra*, 371 N.Y.S.2d at 210; *Witherell* v. *Lasky*, 286 App.Div. 533, 535, 145 N.Y.S.2d 624, 626 (1955); *R. J. Marshall, Inc.* v. *Turner Constr. Co.*, 139 N.Y.S.2d 55, 58 (Sup. Ct. 1955) ("Such a condition precedent to final payment contained in a building or construction contract is binding and will be enforced"); *Mance* v. *Highway Seeding and Sodding Co.*, 36 Misc.2d 374, 375, 233 N.Y.S.2d 863, 864 (Sup. Ct. 1962).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

JUDGMENT ORDER FILED JULY 3, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-2179 and 78-2293

CURTIS-WRIGHT CORPORATION

v.

GENERAL ELECTRIC COMPANY, *Appellant*

(D.C. Civil No. 76-0794)

Submitted June 9, 1980

BEFORE: SEITZ, *Chief Judge*, ALDISERT and ROSENN, *Circuit Judges*.

JUDGMENT ORDER

Upon consideration after remand from the Supreme Court and after consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ SEITZ
Chief Judge

ATTEST:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: July 3, 1980

OPINION ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, FILED DECEMBER 5, 1977

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Civil Action No. 76—794

[TITLE OMITTED]

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Messrs. Hannoch, Weisman, Stern and Besser
By: Mr. Albert G. Besser
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By: Mr. Isaac N. Groner (District of Columbia bar)
Attorneys for defendant

COOLAHAN, Senior District Judge

Plaintiff, Curtiss-Wright Corporation, and defendant, General Electric Company, a prime contractor of the United States Navy, entered into a series of 21 military procurement subcontracts from 1968 to 1972 which called for Curtiss-Wright to produce, for delivery to the United States Navy, various components for use in nuclear submarines and surface vessels. On April 30, 1976, Curtiss-Wright filed a 16-count complaint in this court seeking damages and reformation with regard to these 21 subcontracts.[1] As permitted by order of this Court on November 18, 1976, plaintiff filed an amendment to and supplemental complaint (adding counts 17 and 18) seek-

[1] Plaintiff complains, *inter alia*, of misrepresentations by the defendant during negotiation and execution of the subcontracts and contractual breaches by the defendant during the course of plaintiff's performance.

ing, with regard to 12 of these subcontracts, the recovery of the sum of $8,378,536[2] representing the balance allegedly due for goods sold and delivered to defendant over and above the unliquidated damages sought in the original 16 counts of the complaint. It should be noted that there are also counterclaims involved in the instant lawsuit. Jurisdiction over this action exists pursuant to the diversity statute, 28 U.S.C.§1332.

Curtiss-Wright has moved before this Court for an order granting partial summary judgment as to counts 17 and 18 of the amended complaint. General Electric also has moved for partial summary judgment in its favor as to these counts. The parties agree that the goods involved have already been manufactured and delivered by Curtiss-Wright.

As pointed out above, in the 17th and 18th counts of the amended complaint, plaintiff seeks to recover an $8,378,536 balance allegedly owed on 12 of the subcontracts between the parties. General Electric maintains that its continued withholding of that sum is justified under the subcontracts involved because a condition precedent to final payment has not been satisfied. The pertinent clause in the subcontracts reads:

> "Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price."

It is the defendant's position that according to this clause, Curtiss-Wright must unqualifiedly release all claims against General Electric and the Government relating to the

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[2] This figure represents approximately 10% of the aggregate prices set forth in the subcontracts. The remainder has already been paid to Curtiss-Wright by General Electric.

12 subcontracts in question before it can recover the balance allegedly due under them. Since plaintiff has only offered a qualified release, excepting from the release those very claims it is asserting against defendant in this lawsuit, the defendant maintains that it is entitled to summary judgment on these counts of the complaint because this condition precedent to the right of plaintiff to receive final payment has not been satisfied. The plaintiff, on the other hand, believes that it is entitled to partial summary judgment on these counts, contending that the clause in question should be construed as having no application whatever in this context and thus should not be considered as a bar to plaintiff's right to recover the funds withheld thereunder.

The subcontracts between the parties contain provisions electing New York law as governing "in all respects." There is no reason why the parties' choice in this regard should not be honored. The pertinent New Jersey choice-of-law principles[3] indicate that the New Jersey courts, if faced with the issues presently before this Court, would honor the New York choice-of-law provisions included in these subcontracts since the applicable New York substantive law does not violate settled public policies of New Jersey and the transaction does bear a reasonable relationship to the State of New York.[4] N.J.S.A. 12A:1-105(1); *Farris Engineering Corporation* v. *Service Bureau Corporation*, 406 F.2d 519, 521 (3d Cir.1969); *Congress Factors* v. *Malden Mills, Inc.*, 332 F. Supp. 1384, 1390 (D.N.J. 1971).

Plaintiff primarily relies on *Tufano Contracting Corp.* v. *Port of New York Authority*, 33 Misc. 2d 1028, 227 N.Y.S. 2d 707 (Sup. Ct. 1962), *aff'd*, 18 A.D.2d 832, 237 N.Y.S. 2d

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[3] Federal District Court jurisdiction over this case exists because of diversity of citizenship. Thus, New Jersey law must be applied, including New Jersey's choice-of-law rules. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

[4] Both plaintiff and defendant have also agreed in their briefs that New York law is to govern.

562 (2d Dept. 1963), *aff'd*, 13 N.Y. 2d 967, 244 N.Y.S. 2d 643, 194 N.E. 2d 603 (Ct. App. 1963), in support of its position. In that case, the plaintiff contractor had performed pursuant to a contract with the defendant Port of New York Authority and had thereafter commenced suit against the Authority for the payment of balances allegedly due under the construction contract, for compensation for extra work done thereunder, and for damages due to alleged contractual breaches by the defendant. The parties had included in their agreement a clause similar in language and effect to the clause involved in the instant case, and plaintiff similarly was moving for partial summary judgment on its claim for the balances due. The pertinent clause read:

> "The acceptance by the Contractor, or by anyone claiming by or through him, of the Final Payment shall be and shall operate as a release to the Authority of all claims and of all liability to the Contractor for all things done or furnished in connection with this Contract and for every act and neglect of the Authority and others relating to or arising out of this Contract, excepting only his claims for amounts withheld by the Authority as hereinafter provided and for interest upon the Final Payment, if this payment is improperly delayed."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. In opposition to the motion, defendant argued:

> ". . . Judgment for plaintiff on its first cause of action could be given at this time only by ignoring the plain provisions of the contract in suit to the effect that acceptance by plaintiff of a final payment operates as a release to the Port Authority."

Tufano Contracting Corp., 227 N.Y.S. 2d at 708. This is substantially the same argument being made by General Electric in opposition to Curtiss-Wright's partial summary judgment motion and in support of its own motion for partial summary judgment.

The trial court in *Tufano* pointed out quite correctly that the release clause was valid and would be enforced if a contractor accepted final payment and thereafter attempted to assert claims under the same contracts. 227 N.Y.S. 2d at 708. *See also Brandt Corp. v. City of New York*, 14 N.Y.2d 217, 250 N.Y.S. 2d 407, 199 N.E. 2d 493 (1964); *Buffalo Elec. Co. v. State*, 14 N.Y. 2d 453, 253 N.Y.S. 2d 537, 201 N.E. 2d 869 (1964). However, in *Tufano*, the contractor did not accept final payment, but instead filed suit asserting claims both for the final payments and for other contractual relief. The trial court stated that in so doing the "plaintiff did not contract away its right to sue for sums which it had earned," 227 N.Y.S. 2d at 708, and ultimately ruled:

> ". . . the release clause nowhere prescribes the time when judgment may be entered after such action is brought. Nor does the court consider judgment on the first cause of action to be final payment under the release clause of the contract."

227 N.Y.S. 2d at 708-709. Thus the court was of the opinion that summary judgment on the claim for the balances due did not constitute acceptance of "final payment" for purposes of the contractual provision that acceptance of final payment would operate as a release to the defendant.

The Supreme Court's decision in *Tufano* was affirmed by the Appellate Division and by the New York Court of Appeals. The Appellate Division agreed that plaintiff's acceptance of payment pursuant to the partial summary judgment ruling should not be deemed the equivalent of voluntary acceptance of final payment under the clause in question and thus would not result in the release of its other claims arising out of the contract. The Court of Appeals affirmed without opinion.

The pertinent contractual provision in the present case is strikingly similar to that involved in *Tufano*. It likewise provides that acceptance of final payment by Curtiss-Wright should operate to release General Electric and the Govern-

ment from "all liabilities, obligations and claims arising under" the various contracts between the parties. According to *Tufano*, the contracts in question do not prescribe the time when judgment may be entered on a claim for the amount withheld after an action such as the present one has been instituted. 227 N.Y.S. 2d at 708-709. Thus the contractual clauses in question are not expressly applicable in the context of the instant motions for partial summary judgment. Therefore, payment to Curtiss-Wright of the balances due pursuant to an order of the Court would not constitute "final payment" as to result in a release of General Electric and the Government from "all liabilities, obligations and claims arising under" the contracts between Curtiss-Wright and General Electric.

The defendant has claimed that *Tufano* is not apposite and that instead *R.J. Marshall, Inc.* v. *Turner Construction Co.*, 139 N.Y.S. 2d 55 (Sup. Ct. 1955), represents the controlling authority under New York case law. In *R.J. Marshall*, a subcontractor had moved for partial summary judgment upon its first cause of action against a contractor for the alleged balance owing under a written contract. The contract in question specifically provided:

> ". . . Prior to final payment, the subcontractor shall execute and deliver to Turner (the contractor), a General Release in a form satisfactory to Turner, holding Turner and the Owner free and harmless from all claims arising out of, or in connection with, this contract."

139 N.Y.S. 2d at 57. The defendant, in opposition to the summary judgment motion, had alleged that a condition precedent to plaintiff's right to final payment had not been complied with, that being the execution by plaintiff to defendant of a general release as called for by the contract. The court ruled that plaintiff's contention that the condition precedent had been waived by defendant presented a question not properly the subject of summary disposition. The court also held that such a clause could preclude partial summary judgment and would be so enforced.

R.J. Marshall is distinguishable from both *Tufano Contracting Corp.* and the case *sub judice*. In *R.J. Marshall*[5] the parties had expressly provided for the performance of a specific act before the right to final payment was to accrue. In the present case and in *Tufano* the fact of final payment was fashioned by the contracts to operate as the release. The contracts between Curtiss-Wright and General Electric state that the parties "agree as a condition precedent for final payment, that the Buyer and the Government. . .are released." The fact of final payment was to result in a release of General Electric and the Government, the release being the condition attached to final payment. The pertinent clause in *Tufano* was similar in this respect. The contractual provision in *R.J. Marshall*, however, in requiring a written release before final payment was to become due, might be considered applicable in the context of partial summary judgment. In any event, the relevant contractual provision in the instant case is closer in language and effect to that involved in *Tufano* and thus should also not be considered applicable to the issues presently before this Court. *Tufano Contracting Corp.*, 227 N.Y.S. 2d at 708-709.

Alternatively, to the extent that *R.J. Marshall* may be deemed apposite, that is, to the extent that the contract presently before this Court more closely resembles that involved in *R.J. Marshall* than that in *Tufano*, this Court must now consider *R.J. Marshall* to have been repudiated by the subsequent decisions of the New York courts in *Tufano*.[5] *Tufano's* definition of "final payment" as not including an award by a court pursuant to an application for partial summary judgment must be regarded as also applicable in the *R.J. Marshall* situation as well. The *Tufano* case is the more recent of the two cases and was affirmed with opinion by the Appellate Division and affirmed without opinion by the New York Court of Appeals. Since New York law is to govern,[6] *Tufano*

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[5] The New York courts in *Tufano* did not refer to the opinion in *R.J. Marshall Inc. v. Turner Construction Company*.

[6] See pp. 3-4, [App. 4a], *supra*.

must be considered as the controlling authority in New York on the issues immediately before this Court.

For the foregoing reasons, the defendant is not justified in withholding final payment from the plaintiff at this time because of the "final payment" clause in the subcontracts between the parties. Furthermore, any acceptance by Curtiss-Wright of payment from General Electric pursuant to this Court's ruling will not operate to release General Electric and the Government from the other claims of plaintiff Curtiss-Wright which are presently the subject of this lawsuit. The parties in this action agree, and the New York case law is in accord, that the issue of interest due on any moneys withheld is not properly before the Court at this time. Therefore, the Court will not make any ruling on that issue. The parties are instructed to submit an appropriate order.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S EIGHTEENTH AND NINETEENTH DEFENSES, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE AMENDMENT TO AND SUPPLEMENTAL COMPLAINT, AND DEFERRING FOR LATER CONSIDERATION THE QUESTION OF PREJUDGMENT INTEREST, FILED FEBRUARY 24, 1978

UNITED STATED DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) Plaintiff's motion pursuant to Rule 12f of the Federal Rules of Civil Procedure to strike Defendant's Eighteenth and Nineteenth Affirmative Defenses, (2) Plaintiff's motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and (3) Defendant's cross-motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and this Court having considered the moving papers and briefs filed by the parties, and the Court having further considered the oral argument of counsel, and pursuant to this Court's opinion filed December 5, 1977,

It is, on this 24th day of February, 1978,

ORDERED:

1. That Plaintiff's motion to strike Defendant's Eighteenth Affirmative Defense be and the same is hereby granted;

2. That Plaintiff's motion to strike Defendant's Nineteenth Affirmative Defense be and the same is hereby granted;

3. That Plaintiff's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint in the amount of $3,673,584.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

4. That Plaintiff's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint in the amount of $4,704,952.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this lawsuit, (2) any other claim of Plaintiff as to any contract not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraphs 127 and 132 of the Amendment to and Supplemental Complaint;

5. That Defendant's motion for summary judgment on the Seventeenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied;

6. That Defendant's motion for summary judgment on the Eighteenth Count of the Amendment to and Supplemental Complaint be and the same is hereby denied; and

7. That the question of prejudgment interest is hereby deferred for later consideration by this Court.

/s/ JAMES A. COOLAHAN
James A. Coolahan
U.S. Senior District Judge

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WITH PREJUDGMENT INTEREST ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ADDITIONAL SUPPLEMENTAL COMPLAINT, FILED AUGUST 29, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

(Hon. James A. Coolahan)

Civil Action No. 76-794

[TITLE OMITTED]

This matter having been opened to the Court upon (1) plaintiff's motion pursuant to Rule 15(d) of the Federal Rules of Civil Procedure to file an Additional Supplemental Complaint (19th Count), (2) plaintiff's motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment with prejudgment interest on the 19th Count of the Additional Supplemental Complaint, (3) defendant's cross-motion pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the 19th Count of the Additional Supplemental Complaint, and defendant having made no objection to plaintiff's motion to file the Additional Supplemental Complaint, and the parties having agreed that the rulings of this Court as set forth in the Court's Opinions filed December 5, 1977, and June 20, 1978, with regard to the Amendment To And Supplemental Complaint in this action are dispositive of the issues raised by the cross-motions for summary judgment on the 19th Count of the Additional Supplemental Complaint, and the parties having further agreed upon the dates from which prejudgment interest shall run as to the nine (9) purchase order enumerated in the 19th Count of the Additional Supplemental Complaint, and good and sufficient cause having been shown,.

It is on this 29 day of August, 1978,

ORDERED:

1. That plaintiff's motion to file an Additional Supplemental Complaint be and the same is hereby granted;

2. That plaintiff's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint in the amount of $10,535,872.00 be and the same is hereby granted, and any acceptance by Plaintiff of payment from Defendant pursuant to this Order will not operate to release Defendant and the Government, their officers, agents and employees from (1) the other claims of Plaintiff that are presently the subject of this law suit, (2) any other claim of Plaintiff as to any contract not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment To And Supplemental Complaint, and (3) any claim of Plaintiff for final payment under any contract which is not listed in paragraph 137 of the Additional Supplemental Complaint or paragraphs 127 and 132 of the Amendment to And Supplemental Complaint.

3. That Plaintiff's motion for an award of prejudgment interest on the 19th Count of the Additional Supplemental Complaint be and the same is hereby granted, and prejudgment simple interest at the rate of six percent per annum shall run from the following dates with respect to each of the nine (9) purchase orders enumerated in the 19th Count of the Additional Supplemental Complaint:

Purchase Order	Date Interest Begins to Run
B-451	January 26, 1977
B-452	January 19, 1977
B-428	January 26, 1977
A-641	May 15, 1978
A-656	May 21, 1977
A-661	July 19, 1978
A-675	May 15, 1978
B-478	June 2, 1978
A-113	August 14, 1978

4. That defendant's motion for summary judgment on the 19th Count of the Additional Supplemental Complaint be and the same is hereby denied.

/s/ JAMES A. COOLAHAN
James A. Coolahan,
U.S.D.J.

Consented to as to Form;

CRUMMY, DEL DEO, DOLAN & PURCELL

Attorneys for Plaintiff,
Curtiss-Wright Corporation

/s/ RALPH N. DEL DEO
Ralph N. Del Deo

HANNOCH, WEISMAN, STERN & BESSER

Attorneys for Defendant,
General Electric Company

/s/ ALBERT G. BESSER (JJF)
Albert G. Besser

COLE AND GRONER, P.C.

Attorneys for Defendant,
General Electric Company

/s/ ISAAC N. GRONER (JJF)
Isaac N. Groner

GENERAL ELECTRIC COMPANY

Machinery Apparatus Operation

Schenectady, New York

TERMS & CONDITIONS OF PURCHASE

NAVY 604-4

5. PAYMENTS—

a. Except as otherwise provided in this order, e.g., progress payments, no payment by Buyer shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller has met all the requirements of the order, or (2) receipt of the supplies at destination, whichever last occurs. Buyer may at his discretion make payments for partial delivery of supplies if so requested by Seller. No payment made by Buyer shall be deemed to indicate final acceptance and any payment made prior to final acceptance shall be returned by Seller at the request of Buyer if the supplies to which the payment relates are rejected.

b. Unless otherwise provided, if this order provides a discount for prompt payment, the discount period shall be calculated from the date an acceptable invoice and supporting evidence that all order requirements have been met is received or the date of receipt at destination of the supplies, whichever last occurs.

c. Seller and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than ten percent (10%) of the total order price.

AFFIDAVIT OF F.J. BALICKI, FILED MAY 31, 1977 WITH ATTACHMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-794

[TITLE OMITTED]

STATE OF NEW YORK)
) SS
COUNTY OF SCHENECTADY)

F.J. Balicki, being duly sworn, deposes and states:

1. I have been an employee of the General Electric Company ("G.E.") since 1965 and am presently the Manager of Procurement Operations of G.E.'s Machinery Apparatus Operation ("M.A.O.") and have been since 1974. I submit this Affidavit in support of G.E.'s Cross-Motion for Partial Summary Judgment and Opposition to the Motion of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") for Partial Summary Judgment and to Strike Certain Defenses and to Dismiss the Counterclaim. I have personal knowledge of the matters set forth herein.

2. Between April 12, 1968, and September 29, 1972, G.E. and Curtiss-Wright entered into a series of 21 purchase orders by which Curtiss-Wright agreed to produce, for delivery to the United States Navy ("Navy"), certain components used in the propulsion systems of nuclear submarines and surface vessels. These purchase orders were designated with the following numbers: A-550, A-595, A-641, A-642, A-656, A-661, A-675, A-113, B-384, B-382, B-425, B-423, B-412, B-410, B-428, B-429, B-433, B-442, B-452, B-451, and B-478.

3. Incorporated by reference within each of the purchase orders listed in Paragraph 2 above is Article 5c of the "Terms

& Conditions of Purchase" that are appended as Exhibit D to the Affidavit of James H. Sullivan filed by Curtiss-Wright in this action. Article 5c provides in its entirety:

> "Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute not less than 10 percent (10%) of the total order price."

4. In July 1968, I was the Senior Contract Negotiator with primary responsibility on behalf of G.E. for the negotiation of A-595 with Curtiss-Wright. A-595 was the second of the 21 purchase orders entered into between G.E. and Curtiss-Wright.

5. During the negotiations for A-595, the negotiators for Curtiss-Wright sought to exclude from this purchase order a provision for the withholding of money until final payment. Although G.E. made some concessions on other matters during the negotiations for this purchase order, the provision for withholding was not excluded, and Curtiss-Wright agreed to its inclusion. As stated in Paragraph 3 above, a provision for withholding has been agreed to by Curtiss-Wright in each and every purchase order involved in this action, including those entered into subsequent to A-595.

6. I would like to explain briefly the process by which final payments may be made under each of the purchase orders listed in Paragraph 2 above. Each of these purchase orders is a "maximum-price-redeterminable-downward-only" contract. Accordingly, before the amount of final payment can be calculated, a final fixed price must be established through "redetermination." The contracts require that this be accomplished by means of a formal amendment to the purchase order, derived as a result of negotiation between G.E.

and Curtiss-Wright. Before this amendment is formally executed by Curtiss-Wright, however, it must be reviewed and approved by the Navy because, under the terms of the contracts between the Navy and G.E. and the purchase orders between G.E. and Curtiss-Wright, as well as the Armed Services Procurement Regulations, the Navy must approve all amendments which establish a firm fixed price by redetermination. Therefore, without Navy approval the amendment necessary to make final payment cannot be issued.

7. With respect to purchase orders B-382, B-384, B-410, B-412, and B-425 — the purchase orders which are the subject of the Seventeenth Count of the Amendment To And Supplemental Complaint — G.E. and Curtiss-Wright have agreed to, and the Navy has approved, an amount representing the redetermined firm fixed price, less progress and liquidation payments. This amount is $3,673,584.00. However, when Curtiss-Wright executed the final amendment to each purchase order that would reflect this agreement, it purported to do so only "conditionally," as reflected in the letter which is appended as Exhibit B to the Sullivan Affidavit. Similarly, Curtiss-Wright submitted invoices, for each of these purchase orders, containing a statement that, "[n]otwithstanding any provision of this order to the contrary, [Curtiss-Wright] reserves all rights arising out of the loss. . .on this and other orders which is the subject of a Request for Extraordinary Contractual Relief under P.L. 85-804 filed with the Department of the Navy."

8. Because the actions of Curtiss-Wright described in Paragraph 7 above were inconsistent with Article 5c of the "Terms and Conditions of Purchase," the invoices for these purchase orders were returned to Curtiss-Wright. Subsequently, these invoices were again submitted by Curtiss-Wright and accompanied by a "qualified release" in which Curtiss-Wright purported to release G.E. and the Government from all claims except those which are the subject of this action. A copy of this qualified release has been appended as Exhibit C to the Sullivan Affidavit.

9. With respect to purchase orders A-550, A-595, A-642, B-423, B-429, B-433, and B-442 — the purchase orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint — the processing of the "Final Price Redetermination Amendments" has not been completed because of Curtiss-Wright's representation that these amendments would similarly be executed "conditionally." Indeed, Curtiss-Wright has submitted invoices for these purchase orders containing the "qualified release" referred to in Paragraph 8 above. Since, as of this writing, G.E.'s recommendations with respect to a redetermined firm fixed price have not been submitted to, or acted upon by, the Navy as to three of the orders (A-550, A-595, and A-642), the cumulative redetermined firm fixed price for the orders which are the subject of the Eighteenth Count of the Amendment To And Supplemental Complaint may not prove to be exactly $4,704,952.00, as Curtiss-Wright alleges. As stated previously, the approval of the Navy is necessary before the final amendment fixing the final price of these purchase orders may be executed between G.E. and Curtiss-Wright.

10. With respect to A-550 and A-595, wholly apart from Curtiss-Wright's failure to comply with Article 5c of the "Terms and Conditions of Purchase," there are additional items to be delivered by Curtiss-Wright before final payments may be made. These items are not the large components that were called for by the purchase orders themselves, but include hardware and software which relate to the large components.

11. Although M.A.O. considers that it is the Navy's lawful prerogative to decline to approve any amendment authorizing final payment to Curtiss-Wright, as long as Curtiss-Wright seeks to deviate from the provisions of Article 5c, nonetheless, on three occasions, representatives of M.A.O. have recommended to the Navy that perhaps, in this instance, it should waive strict compliance with Article 5c. On each occasion the Navy has disapproved that recommendation. The letters containing the responses to these recommendations are self-explanatory and are appended hereto as Exhibits A, B, and C.

12. G.E.'s Counterclaim and the portion of its Answer containing its set-off were reviewed by the Navy prior to their filing in this action. The Navy raised no objection to G.E.'s asserting the set-off and Counterclaim, including those Counts of the Counterclaim which were stated to be for the ultimate benefit of the Navy.

/s/ F.J. BALICKI
F.J. Balicki

Sworn to May 26, 1977.

EXHIBIT A

ASSISTANT NAVAL SEA SYSTEMS COMMAND
TECHNICAL REPRESENTATIVE
MACHINERY APPARATUS OPERATION
P.O. BOX 1021
SCHENECTADY, NEW YORK 12301

In Reply
3/5-3034/75
5800/1
CWC
5 December 1975

From: Assistant Naval Sea Systems Command Technical Representative, MAO

To: General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301

Attn: F.J. Balicki, Manager-Administration Operation

Subj: Curtiss-Wright Conditional Acknowledgement of Redetermination Amendments

Ref: (a) MAO ltr P5-256 dtd 7 November 1975

1. Reference (a) requests ANSTR review and consent to a revision to the CWC redetermination cut off clause. ANSTR does not agree with reference (a).

2. ANSTR has no objection to the inclusion of the following:

> Seller reserves the right to pursue its request for extraordinary contractual relief under PL85-804 filed with the Department of the Navy.

3. The action taken by this letter is considered by the Government to be within the scope of existing prime contracts between MAO and the Government and does not authorize any delay in delivery or additional cost to the Government, either direct or indirect.

/s/ H.A. CARDINALE
H.A. Cardinale

EXHIBIT B

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 484

General Electric Company
Machinery Apparatus Operation
P.O. Box 1021
Schenectady, New York 12301
Attention:
Mr. E.F. Phelps
General Manager

RECEIVED
F.J. BALICKI
JUL 29 1976
ADMINISTRATION OP.

Dear Sir:

Your letter of 14 July 1976 recommends acceptance of a qualified and partial claims release and final payment of withheld amounts on certain General Electric Company, Machinery Apparatus Operation (MAO) subcontracts with Curtiss-Wright Corporation. Briefly, the claims release which Curtiss-Wright proposes to give MAO would exclude claims set forth in a pending civil action filed by Curtiss-Wright against General Electric.

As your letter notes, the basic issue is whether Curtiss-Wright should receive final payment on the orders in question while pursuing claims under these same orders. It is noted that such an action would be in

direct conflict with Article 5, paragraph c, of the terms and conditions applicable to the subcontracts in question which requires an unqualified claims release as a condition precedent to final payment. Article 5c serves to encourage timely submittal and resolution of vendor claims. The action proposed by MAO would defeat this purpose of Article 5c.

Since Curtiss-Wright entered into these subcontracts cognizant of the terms and conditions, Curtiss-Wright either knew or should have known the consequences of not giving MAO an unqualified claims release at the time when final payment otherwise was due. Undoubtedly a part of the consideration received by Curtiss-Wright from MAO under the subcontracts was for Article 5c. Apparently, MAO would not receive consideration in return for deletion of the contract requirement for an unqualified claims release.

Notwithstanding the clarity of the subcontract terms which your letter appears to acknowledge, you raise the question of whether continued withholding under the subcontracts is conscionable and enforceable under the circumstances. The claims which Curtiss-Wright proposes be excepted from the claims release were filed years after the contracts were entered, and in many cases years after the occurrence of the events on which the claims are based. Curtiss-Wright was or should have been fully cognizant that this late identification of claims likely would result in withholding of final payment until the claims were resolved. Based on the above, it is clear that the existence of outstanding claims at the time when final payment otherwise would be due is the result of Curtiss-Wright's own actions, the consequences of which were or should have been known to Curtiss-Wright.

Your letter draws an analogy between the claims release which you propose to accept and that judged acceptable to NAVSEA regarding the Curtiss-Wright Public Law 85-804 request. This analogy is not valid. Because the Curtiss-Wright Public Law 85-804 request was a direct Curtiss-Wright-NAVSEA concern, extracontractual in nature and not a claim under the subcontracts, Curtiss-Wright was not contractually obligated to give MAO a release of their right to pursue the Public Law 85-804 request. However, Curtiss-Wright's present pursuit of claims against MAO under its subcontracts requires, by the terms and conditions of the subcontracts, a withholding of monies until such time as an unqualified claims release is effected.

Another troublesome aspect of your proposed action is the dangerous precedent it would set for other subcontractors. By making a claims release a negotiable issue with vendors when final payment is otherwise due, the article's intent would be negated. There would be no incentive for subcontractors to resolve claims in a timely manner.

Based on the above, the qualified claims release proposed by Curtiss-Wright is not acceptable. Accordingly, your request for consent to the redetermination amendments between MAO and Curtiss-Wright is not granted.

Sincerely,

/s/ WILLIAM MOHNEY
William Mohney
Contracting Officer

EXHIBIT C

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
0246/WM
4280
Ser 1451

RECEIVED
DEC 21, 1976
R.C. RADICE
15 DEC 1976

General Electric Company
Machinery Apparatus Operation
Post Office Box 1021
Schenectady, New York 12301
Attn:
E.F. Phelps
General Manager

Ref:

(a) MAO ltr MAO-A6-91U of 14 Jul 76

(b) NAVSEA ltr 0246/WM 4280 Ser 484 of 28 Jul 76

(c) MAO ltr MAO-A6-131U of 27 Oct 76

Reference (a) requested Contracting Officer consent to redetermination amendments on subcontracts between the General Electric Company and Curtiss-Wright Corporation. Under your proposal, final payment would have been made to Curtis-Wright and the subcontracts would have been redetermined upon receipt of a qualified claims release which would have excluded

claims set forth in a pending lawsuit filed by Curtiss-Wright against General Electric.

By reference (b), the Contracting Officer declined to grant consent to the redetermination amendments on the basis that the qualified release of claims offered by Curtiss-Wright does not meet the subcontract requirement for an unqualified release of claims prior to final payment.

Reference (c) again requests Contracting Officer consent to the redetermination amendments based on qualified claims releases from Curtiss-Wright. In addition, reference (c) recommends use of a surety bond to be procured by Curtiss-Wright.

The concept of a surety bond was noted in reference (a), and this approach was considered by the Contracting Officer in preparing reference (b). The Contracting Officer concluded that a surety bond or any other contractual vehicle which would allow final payment of withheld amounts prior to obtaining an unqualified claims release was not acceptable for the following reasons:

1. The principal purpose of the contract clause requiring an unqualified claims release prior to final payment is to encourage the timely submission and resolution of any claims which the supplier may have.

2. The claims release provision has been accepted by Curtiss-Wright in all its contracts for the Naval Nuclear Propulsion Program.

3. Release of withholding or use of a surety bond would defeat the purpose of the contract clause in question and could set a precedent whereby other Naval Nuclear Propulsion Program suppliers might conclude that they would be better off *not* to identify and settle claims promptly.

4. Curtiss-Wright's decision to submit large claims late in the performance of its orders results in the current withholding. Such withholding is in accordance with the terms of the contracts Curtiss-Wright entered into. Thus, there is no basis for extraordinary contractual vehicles such as a surety bond to relieve Curtiss-Wright of its contractual commitments.

Based on the above, your proposal to accept a qualified claims release and to release of final payments on Curtiss-Wright subcontracts, subject to surety bond, is not acceptable. Accordingly, Contracting Officer consent to the redetermination amendments is not granted.

Sincerely,

/s/ WILLIAM MOHNEY
William Mohney
Contracting Officer

SUPPLEMENTAL AFFIDAVIT OF E.A. KLEIN, FILED

AUGUST 22, 1978

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

Civil Action No. 76-794

(Hon. James A. Coolahan)

[TITLE OMITTED]

STATE OF NEW YORK)

) SS

COUNTY OF SCHENECTADY)

E.A. KLEIN, being duly sworn, deposes and states:

1. I am the Manager of Procurement Operations of the Machinery Apparatus Operation ("M.A.O.") of Defendant General Electric Company ("G.E."). I have previously submitted an Affidavit in this action dated April 14, 1978. I submit this Supplemental Affidavit in support of G.E.'s Motion for Summary Judgment on Count 19 of the Additional Suplemental Complaint of Plaintiff Curtiss-Wright Corporation ("Curtiss-Wright") and in opposition to Curtiss-Wright's Motion for Summary Judgment with Prejudgment Interest on Count 19 of the Additional Supplemental Complaint.

2. Each of the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint contains the following two clauses:

> "[N]o payment by Buyer [G.E.] shall be due until thirty (30) days after (1) receipt of an acceptable invoice and appropriate evidence that Seller [Curtiss-Wright] has met all requirements of the order, or (2)

receipt of the supplies at destination, whichever last occurs." Terms and Conditions of Purchase, Article 5a.

"Seller [Curtiss-Wright] and each assignee under an assignment in effect at the time of final payment, agree as a condition precedent to final payment, that the Buyer and the Government, their respective officers, agents and employees are released from all liabilities, obligations and claims arising under or by virtue of this order. Seller further agrees that the final invoice shall constitute no less than ten percent (10%) of the total order price." Terms and Conditions of Purchase, Article 5c.

3. Each of these nine purchase orders, as well as each of the 12 purchase orders, with the exception of B-429, that are the subject of Counts 17 and 18 of Curtiss-Wright's Amendment To And Supplemental Complaint, contains the following standard form final invoicing instructions: "The final invoice(s) shall be marked 'FINAL' on the face of the invoice to signify billing is complete under this Order and that all claims on this Order against General Electric Company-M.A.O. and/or the Government have been resolved."

4. As Mr. Sullivan stated in his Fourth Supplemental Affidavit dated July 17, 1978 (Paragraph 4), each final invoice submitted by Curtiss-Wright for these nine purchase orders was accompanied by a qualified release purporting to release G.E. and the Government from all claims except those which are the subject of this action. Curtiss-Wright has never submitted an "acceptable invoice" for these nine purchase orders.

5. Subsequent to the filing of Mr. Sullivan's Fourth Supplemental Affidavit, I discussed with Mr. Sullivan the dates on which final payment to Curtiss-Wright would have been due if Curtiss-Wright had complied with Articles 5a and 5c and had submitted an acceptable

invoice. We agreed that final payment on the nine purchase orders that are the subject of Count 19 of Curtiss-Wright's Additional Supplemental Complaint would have been due, in the amounts indicated, on the following dates, had Curtiss-Wright not attempted to qualify its release of G.E. and the Government while seeking final payment:

Purchase Order	Date Payment Due	Amount of Final Payment
B-451	January 26, 1977	$ 292,564
B-452	January 19, 1977	2,543,020
B-428	January 26, 1977	496,519
A-641	May 15, 1978	553,506
A-656	May 21, 1977	1,436,144
A-661	July 19, 1978	1,144,786
A-675	May 15, 1978	1,831,466
B-478	June 2, 1978	1,370,817
A-113	August 14, 1978	867,050

6. Therefore, in accordance with this Court's Opinions of December 5, 1977, and June 20, 1978, the total final payment due Curtiss-Wright on the nine purchase orders that are the subject of Count 19 of the Additional Supplemental Complaint is $10,535,872, with simple prejudgment interest at six percent per annum to be calculated with respect to each purchase order from the dates specified above.

/s/E.A. KLEIN
E.A. Klein

Sworn to August 21st, 1978.